

No reason to be gentle

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The Federal Constitutional Court, more precisely the Second Senate with Justice Peter M. Huber as rapporteur, has declared the Berlin rent cap law unconstitutional, and its decision can be safely called a conservative one, in the political sense of the term. Not only because of its consequences, which are as profitable for people with capital as they are devastating for people without, but also and above all in its interpretation and shaping of the constitutional order: the state of Berlin may have assumed that it was regulating the Berlin real estate market which has been spiralling into complete insanity, but nothing of the sort; in truth, the matter of rent levels remains solely a question of private autonomous civil contracting which since the days of 19th century liberalism has been exclusively answered by the Federal Civil Code, precluding any legislative interference on the state level, a state of affairs which remains authoritative for the present and the future as “state practice and regulatory tradition”. What could be more conservative than that?

Is it permissible to say so openly? Or does this call into question the integrity of the *Bundesverfassungsgericht*?

The problem of the BVerfG as a political actor and BVerfG criticism as a political instrument is as old as the court itself. The court regularly decides disputes between conservative and progressive tension poles, and thus assigns victory and defeat to one side or the other. As with other courts, its acceptance depends on whether it succeeds in convincing even to the respective loser that it is only the law and not power to which she owes her defeat. This is even more demanding for constitutional courts than for regular courts, because in disputes before them the very rules and procedures are at stake which in a democracy open up the conservative/progressive tension field in the first place. That is why democracy is in danger when the impression arises that the court itself is too much attached to either of those poles.

For the longest time, this impression could be avoided by party balance: some judges were nominated by the conservative CDU/CSU, some by the progressive SPD, one Senate was a little bit more this, the other one a little bit more that, and on the whole both were clearly dominated by mutually accepted middle-of-the-road judges who made sure that the court was, with very few exceptions, safe from being branded as politically biased in one way or another. This balance, as is well known, has become increasingly precarious: The binary red-black logic no longer works; the party landscape has become a lot more confusing, and now, in the dawning post-Merkel era, it even seems possible that the CDU/CSU will follow its erstwhile social-democratic rivals and dwindle to a shadow of its former self once it loses its actual *raison d'être*, the claim to the chancellorship. I suppose there will eventually be some charismatic television face, as in so many other countries from the USA to Ukraine, who will try to fill the vacuum and present himself as a beacon of hope for people and fatherland and as a unifier of the divided nation (albeit hampered by

the peculiarities of German party law, which makes the establishment of movement parties along the lines of the Macron model rather difficult). By then, at the latest, we will unavoidably have a debate about the Federal Constitutional Court as an undemocratic bastion of old elites, and how quickly the sledge can then pick up speed on the way downhill into the abyss of authoritarianism from there on is what I tried to play out in my [Volkskanzler piece](#) 2019.

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Should we go easy with the BVerfG in this delicate situation? Already last year, after its controversial *Weiss* ruling, many, even within the court, admonished the public to tone down their criticism. To lash out so harshly at the court, while constitutional courts over in Poland and Hungary were being deformed into servile instruments of the authoritarian-populist government, was deemed out of line and showing a lack of respect for the institution. I believe, unsurprisingly, that the opposite is true. The more a constitutional court exposes itself politically, the more respect for the institution dictates to not cut it any slack.

There is another type of constitutional court “criticism”, which is in fact no criticism at all and must be sharply distinguished: the insinuation that the court is controlled by the political opponent. Alexander Fischer, a Linke politician and state secretary in the Berlin Senate Department for Labour and Social Affairs, pointed out on the day of the rent cap decision in a tweet that two of the eight judges in the Second Senate are former CDU politicians. (He has [deleted the tweet and declared his regrets](#) in the meantime). This is not a criticism of the conservative reasons for the decision, but an ad hominem argument that casts doubt on their motives instead of their persuasiveness. This is destructive because it acts as a self-fulfilling prophecy: Once the court is identified with the political opponent, the necessity to oust the opponent from it and to take it over oneself follows effortlessly. In this way, it brings about exactly the state of affairs it claims to deplore.

The result can be seen in Poland, where the so-called “Constitutional Tribunal” has been turned into a subservient tool of the governing party to manhandle their opponents with. This week, this institution proved once again its usefulness to the PiS government by ridding it of Ombudsman Adam Bodnar, the last independent constitutional pillar of the rule of law in Poland. His term of office had expired, and because the government does not have a majority in the Polish Senate, no successor could be elected. Now the “Constitutional Tribunal” has, to the surprise of no-one, found that Bodnar’s interim continuation in office is incompatible with the constitution. More on the decision here soon.

But that’s not all: according to RuleofLaw.pl, Prime Minister Mateusz Morawiecki has filed a 129-page petition with the “Constitutional Tribunal” this week, to “finally clarify the relationship between EU law and Polish constitutional law”. The idea is to have everything in the EU Treaty be declared unconstitutional and irrelevant as

far as it allows the ECJ to control the independence of the judiciary in Poland. Even the most dialogue-minded EU commissioner will no longer be able to belittle such a treatment of the primacy of EU law as a cause for grave concern that must be closely monitored, will she? Polexit, here we come.

The week on Verfassungsblog

First of all, a reminder of our **call for papers**: As part of our BMBF-funded project “Open Access to Public Law” (OZOR), we are collecting essays and field reports on how legal scholars experienced their access to publications and publication opportunities during the Corona crisis. More details [here](#).

As far as the BVerfG decision on the **Berlin rent cap** is concerned, we have certainly made an honest effort to offer as much constructive criticism as we possibly could in one day. [TIM WIHL](#) makes no effort to hide his anger about this formalistic “misjudgement”, which at its core operates with a “revived but always wrong public-private distinction”. [SELMA GATHER and FLORIAN RÖDL](#) (the latter was counsel of the state of Berlin in the case) once again explain why, in their view, the court had made the “most unfavourable, constitutionally and practically consequential decision conceivable in the matter”. [JAN-ERIK SCHIRMER](#), on the other hand, considers it conceivable that the Federal Constitutional Court has in fact pushed the door open to a more social and sustainable private law. On top of that, there is a wealth of controversial comments, among which I found [RALF MICHAELS](#)’ particularly instructive.

On 24 March 2021, two courts submitted to the Federal Constitutional Court the question of whether the current law on **parentage**, which so far has been understood biologically by most, is compatible with the Basic Law. Should the child of two married women be entitled to have both as parents? The case could be the prelude to a fundamental rethinking of legal parenthood, says [BERIT VÖLZMANN](#).

Federal Transport Minister Scheuer is causing trouble in the Bundestag by not allowing the investigator of the **car toll enquiry committee** to look into his MPs’ emails. [PAUL J. GLAUBEN](#) analyses the legal background and comes to the conclusion that the law is indeed on the side of the Minister the MP Scheuer, in this case.

In the Bundestag’s first deliberation on the **Lobby Register Act**, CDU MPs and the majority of experts agreed: transparency does not have constitutional status. [TASSILO SCHRÖCK and FILIPP RUZIN](#) don’t think that’s true, though. Transparency in lobbying activities could be based on the principle of democracy.

In **Hong Kong**, the electoral law is currently being reshaped according to Beijing’s will. [SIMON N. M. YOUNG](#) has doubts whether the reforms are necessary and proportionate to achieve the intended goals.

In post-Brexit **United Kingdom**, the traditionally stable British constitutional order is in acute danger of coming apart at the seams – first and foremost with the question

of Scottish independence, where there will be an election next month. In [COLM O'CINNEIDE's](#) analysis, Prime Minister Johnson is playing a high-risk game with the British constitution, following less the populist script than the urge to return to older models of constitutional governance.

The issue of **racism** in British society is addressed by a government report that declares that, in fact, there actually isn't any. [EDDIE BRUCE-JONES](#) sees the report as an alarm signal: If you change the standards for racism, you won't find any racism.

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In **Kyrgyzstan**, a new constitution was adopted on 11 April. It is characterised by a return to “tradition”, which, according to [ASYLAI AKISHEVA](#), conceals much more far-reaching ambitions. The rights of Kyrgyz women will suffer particularly under the new constitution.

Malaysia has passed an anti-fake news law to crack down harder on COVID-19 misinformation. As is so often the case, reference is made to Germany's Network Enforcement Act to justify harsh encroachments on freedom of expression. [LASSE SCHULDT](#) explains how this came about.

Last Thursday, the European Court of Human Rights ruled in favour of **compulsory vaccination** for children in Czechia. [ZUZANA VIKARSKÁ](#) analyses five weaknesses of the judgment's reasoning.

A key pillar of **Australia's** response to the COVID-19 crisis was border closure. Since the Australian Constitution does not contain an explicit catalogue of rights, Australians stranded abroad have now turned to the United Nations as a last resort. [LIZ HICKS](#) finds that Australia is once again relying on political rather than rights-based mechanisms.

Given the high number of COVID-19 deaths in **Brazil**, the Supreme Federal Court banned religious services during the pandemic and, on top of that, decided not to block the opening of a parliamentary enquiry into Bolsonaro's inaction on the pandemic. Two defeats for the President that nevertheless give him an opportunity

to keep his anti-establishment and resentment rhetoric alive, say [THOMAS BUSTAMANTE](#) and [EVANILDA NASCIMENTO DE GODOI BUSTAMANTE](#).

We have concluded our online symposium on constitutional expertise in the political sphere with two articles from **Switzerland**, by [ODILE AMANN](#) on academic freedom as a duty to eschew foregone conclusions and by [EVELINE SCHMID](#) on the freedom of expression of legal scholars on Twitter on the occasion of new media-statement guidelines of the University of Bern.

And our mammoth online symposium **Power and the Covid-19 Pandemic** has recommenced after a break over the Easter holidays, this week with reports from [Norway](#), [Egypt](#), [USA](#), [Israel](#), [Peru](#) and a commentary by [ALICE DONALD](#) and [PHILIP LEACH](#).

So much for our output this week. In our [crowdfunding campaign](#) we still haven't quite managed to hit our €4,000 target mark. We are currently at €3,953.50, to be exact, thanks to the support of currently 651 **Steady members**. Will we make it this week? Almost there. We can do it, can't we?

All the best, thank you and see you soon,

Max Steinbeis

